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09/176,866	10/22/1998	JAMES V. YOUNG	6996	2374

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EXAMINER

DEMILLE, DANTON D

ART UNIT	PAPER NUMBER
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3764

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 24

Application Number: 09/176,866
Filing Date: October 22, 1998
Appellant(s): YOUNG, JAMES V.

MAILED

JUL 2 9 2003

GROUP 3700

Lionel L. Lucchesi
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 22 April 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 1-7 and 9 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

The rejection of claims 15-20 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

254,957	Holt (GB)	7-1926
4,341,540	Howerin	7-1982
4,469,092	Marshall et al.	9-1984
2,655,147	Rohrer	10-1953

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 1 remains rejected under 35 U.S.C. 102(b) as being clearly anticipated by Holt. It is maintained that Holt teaches everything as broadly claimed. While the Holt device may appear different from the instant invention, the claims do not define over Holt. Figure 2 shows a massage head 10 driven by a motor through a cable 12 (figure 1). Figure 4 shows the different parts of the applicator and how it is removably mounted by the screw threads in the top of the housing at 20 onto nipple 16. The nipple 16 is tubular shaped and the portion of the applicator housing mating with the nipple 16 is likewise tubular shaped. Therefore, the applicator has a connection tube integrally formed in said applicator. This tube in the applicator is also adapted to pass contaminants from the cavity to the vacuum source. While the plate 28 is adapted to stop most contaminants there will inevitably be contaminants that the plate does not stop. Moreover, when the plate is over loaded with contaminants, contaminants will pass around plate 28 and the connection tube would pass contaminants from the cavity through the connection tube. Therefore, the tube is adapted to pass contaminants should they get past plate

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28. The applicator has a cavity in an end surface at element 25. The plurality of apertures 26 form a cavity in the end of the applicator which would draw and stretch fibrous tissue of the human body within the cavity at least to some extent. Either individually or collectively, the apertures 26 would draw and stretch fibrous tissue of the human body within the cavity formed as shown in figure 2. It may not draw the tissue within the cavity as well as the instant invention however, it would draw tissue at least to some small extent. It is not clear from the disclosure what dimensions or characteristics of the cavity would be required to draw tissue within the cavity to comprehend the scope of the claimed invention so therefore it would appear that the Holt device would comprehend the claims.

Claims 2 and 3 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Holt. Regarding claim 2, Holt appears silent with regard to any controls for the motor however, the ability to adjust the speed of the motor is well within the realm of the artisan of ordinary skill. It would have been obvious to one of ordinary skill in the art to modify Holt to provide speed control for the motor in order to adjust the vibration of the device. Regarding claim 3, it would have been obvious to one of ordinary skill in the art to modify Holt to provide a collection vile for the vacuum in order to catch any uncollected particulate matter from contaminating the motor. Most vacuum cleaners have a collection means for capturing the particulate matter.

Claims 4 and 5 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Holt in view of Howerin. It would have been obvious to one of ordinary skill in the art to modify Holt to provide a second vile in the vacuum line to collect any liquid as taught by Howerin to catch any liquid to prevent damage or impairing the motor.

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Claims 6, 7, 9 and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Holt in view of Marshall et al. and Rohrer. Holt appears silent with regard to the details of the controls of the motor. Providing some conventional means to control the motor would appear to be well within the realm of the artisan of ordinary skill. Marshall teaches a conventional vacuum massaging system that includes controls for both the vibrator and the vacuum source. There also appears to be no unobviousness to the shape of the applicator. Shaping the applicator to be concave as taught by Rohrer to better conform to the shape of the human body would have been an obvious provision. Holt teaches page 2 lines 36-38 that the device is adapted "to receive a soft rubber or other applicator 25". Clearly the applicator 25 is not limited to that shown in the drawings. Holt is open to receive other applicators other than that shown. Shaping the end of the applicator to accommodate different shapes of the human body doesn't appear to be an inventive step. It would have been obvious to one of ordinary skill in the art to modify Holt to use a motor control system as taught by Marshall to best control the operation of the device and to shape the applicator to be concave as taught by Rohrer to better conform to the shape of the human body. If the vibration of Holt's device were too much it would be obvious to turn down the speed of the motor. Means to provide such a function would be necessary.

Claims 19 and 20 remain rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 18 above, and further in view of Howerin. It would have been obvious to one of ordinary skill in the art to further modify Holt to provide a second vial in the vacuum line to collect any liquid as taught by Howerin to catch any liquid to prevent damage or impairing its efficiency.

(11) *Response to Argument*

Appellant argues that the plate 28 of Holt will prevent contaminants from being drawn into the air passage. While the plate 28 is intended to prevent a certain amount of large contaminants from flowing into the vacuum motor it cannot stop all contaminants. There will be some particles that flow around the plate and smaller, finer contaminants will still get past the plate. Moreover, when the plate becomes over loaded, contaminants will easily flow past the plate. While the plate will stop some contaminants it will not stop all. The examiner is not modifying the reference as appellant has erroneously pointed out. No modification is necessary. The connection tube will still draw contaminants from the cavity through the connection tube. It can't be avoided.

Appellant is arguing intended use. Whether or not contaminants pass through the connection tube or not appears to be unsupported by any clear claim language limitations. The connection tube for drawing the vacuum is taught by Holt. Whether or not there are contaminants that also flow in the air stream is dependent on environmental conditions of intended use. If there were a lot of dust and small particles in the air, the plate 28 wouldn't be able to handle all of fine dust particles. Some would still flow past the plate and enter the connection tube.

Appellant also argues that the applicator of Holt cannot possibly be used to draw and stretch the fibrous tissue of the human body within the cavity as required in claim 1. A cavity is formed in the end of the applicator of Holt by the plurality of passageways 26. Either individually or collectively the vacuum would draw and stretch the skin and any fibrous tissue within the cavity at least to some degree. It is not clear how it wouldn't. There is nothing disclosed to know whether or not the structure of Holt would or wouldn't provide this function. The size of the end portion of Holt would appear to be approximately the same size as the end portion of the instant invention. The suction created at the end of the Holt device would appear to be about the same area as the instant invention. The skin and fibrous tissue would be drawn inwardly of the cavity at least to some extent. What size, dimension or shape of cavity would comprehend appellant's argued function? At what point would the size or shape of the Holt applicator would comprehend appellant's argued function? Perhaps increasing the size of the passageways and decreasing the number passageways would comprehend the argued function. But at what point?

Holt isn't restricted to the specific type of applicator shown. Other applicators are comprehended. Possibly other applicators within the level of ordinary skill in the art would better comprehend the claims in appellant's view. At some point it must. But at what point? Moreover, when all passageways are drawing the skin within the cavity, collectively they would be affecting a larger area of the body. Collectively they would be stretching fibrous tissue. It just isn't clear where the dividing line is between what Holt is doing and what would comprehend the claims.

The examiner is **not** modifying the reference as appellant has erroneously stated to somehow fashion a rejection. Holt anticipates the invention as broadly claimed. Since the structure of Holt anticipates the claim it is not clear the claims would define over a device such as Holt.

Appellant argues that during use of the instant invention lotions are applied to the body and large amounts of contaminants are drawn through the applicator into appellant's device. The same would be true of Holt. If lotion were applied to the body, plate 28 would hold only so much passing large amounts of lotion into the connection tube. This function is all dependent on intended use. If the Holt device were asked to suck up large amount of contaminants, plate 28 would fill up quickly and contaminants would flow around plate 28 into the connection tube as claimed.

Appellant argues that removal of the plate 28 of Holt makes Holt inoperable. The examiner is not removing the plate 28. It is not clear why appellant is removing the plate of 28. Appellant is intentionally destroying the reference in order to argue that the reference is destroyed.

Appellant argues that Holt doesn't teach the cavity is substantially the size of the end surface. A cavity is formed at the end surface of applicator portion 25 by the widened passageway openings 26. The widened ends of passageways 26 would form a cavity separated by only small portions of the applicator end portion structure. The collective area of the passageways 26 would form a cavity that would draw and stretch fibrous tissue of the human body. The cavity may be broken up into a plurality of passageways 26 however, the vacuum that

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is produced is still equivalent to a continuous cavity just more evenly distributed into a plurality of passageways.

Appellant again argues that the cavity must draw and stretch the fibrous tissue of the human body within the cavity. As noted above the passageways 26 individually or collectively would draw and stretch fibrous human tissue to some small degree and therefor comprehend the claims. It is not clear from the disclosure what dimensions of the cavity would be required in order to fall within what appellant decides as the scope of the claimed invention.

Regarding the 103(a) rejection, appellant argues that Holt fails to teach a concave shaped cavity. Holt is not restricted to the exact details of the applicator portion 25 shown in the drawings. As noted above, Holt teaches other applicators 25 can be used. There is no unobviousness to the shape of the end surface of the applicator portion 25. If the applicator portion 25 were concave instead of the shown convex it would comprehend the claimed limitations. The shape of the human body has many different shapes. In fact there are more areas of the human body that are convex thereby requiring a concave shaped applicator in order to be effective and match the shape of the human body. There is no unobviousness to shape it as desired depending on the desired area of the body in which the applicator is being used. Rohrer is merely cited to show the shape of the vacuum applicator can be concave to accommodate convex portions of the human body. To further support the examiner's position the patent to Fisk 1,936,129 shows another vacuum applicator that has both embodiments. Figure 4 shows a convex applicator. Figure 2 shows a concave applicator. Clearly one of ordinary skill in the art can shape the end of the applicator as desired.

Appellant argues that the instant invention is intended to be used on relatively large portions of the body in order for it to function properly. Since the claims and the specification fail to set forth what is to be considered "large portions", it is not clear how Holt would be any different. The end portion of Holt's applicator would appear to be about the same size as the end portion of appellant's applicator. As compared to massaging the fingers of the human body, the Holt device would be ineffectual because it is too large. The Holt device is intended to be used on any area of the body in order to loosen dead skin and provide vibratory massage. Since there really is no portion of the body that Holt device could not provide vibratory massage and vacuum the skin. It would appear Holt is sufficiently large enough to function over a relatively large portion of the body.

Appellant appears to be relying on intended use to distinguish the claimed invention over the prior art. That contaminants would not pass through the connection tube of Holt and that tissue of the human body would not be stretched by the Holt device. It is not clear how much patentable weight can be given these arguments since there is no structural difference between the claimed invention and the Holt device. Putting the Holt device in the same intended use whereby lotion is used, lotion would overwhelm the plate in Holt thereby passing lotion contaminants around the plate and through the connection tube comprehending the claimed limitation. The cavity of Holt formed by the plurality of passageways 26 would appear to draw and stretch fibrous tissue of the human body in the same way as appellant's. It is not clear how it wouldn't since the end surface of Holt and the end surface of the instant invention would appear to be the same size. For these reasons and others as noted above it is believed that examiner's position should be sustained.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Danton DeMille

Primary Examiner

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ddd


July 25, 2003

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